No. 02-5664

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In The
Supreme Court of the United States

DR. CHARLES THOMAS SELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent organization in the United States advancing the mission of America's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,400 direct members – and more than 80 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization with full representation in its House of Delegates.

NACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice. In furtherance of that objective, over the last

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

decade, NACDL has filed approximately ten *amicus* briefs per year with this Court on criminal justice related issues.

SUMMARY OF THE ARGUMENT

Both the Fifth and Sixth Amendments establish Dr. Sell's right to testify regarding his diminished capacity at the time of the alleged criminal activity. Accordingly, this Court should reverse due to the Eighth Circuit's failure to adequately consider the preeminent import of this and other clearly established constitutional rights implicated by the government's forced medication of Dr. Sell.

ARGUMENT

I. Dr. Sell Has A Constitutional Right To Present Evidence Of His Diminished Capacity.

In allowing the forcible medication of Dr. Sell, the Eighth Circuit offered only cursory analysis of the constitutional implications of this government action. *United States v. Sell*, 282 F.3d 560, 571-72 (8th Cir. 2002). Mentioning only the possible interference with Dr. Sell's demeanor and ability to assist counsel at trial, the Court of Appeals ignored a host of long-recognized constitutional rights compromised by his forced medication, in particular, Dr. Sell's rights to present a defense and to testify on his own behalf. Firmly grounded in the Fifth and Sixth Amendments, these two rights give rise to Dr. Sell's constitutionally protected right to present a "diminished capacity defense," *i.e.*, the right to present his own unfettered testimony regarding his state of mind at the time of the alleged criminal activity.

A. Diminished Capacity Is An Evidentiary Concept, Not An Affirmative Defense.

The term "diminished capacity defense" is a misnomer that has fostered some confusion within case law, often through the confounding of two distinct concepts. First, "diminished responsibility," an affirmative defense widely accepted only in European countries, "permits the jury to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act." *United States v. Pohlot*, 827 F.2d 889, 904 (3d Cir. 1987). In contrast, "diminished capacity" is not an affirmative defense at all, but instead refers to the defendant's introduction of evidence of a mental disorder as a means of negating *mens rea*. Dr. Sell wishes to protect his right to present evidence under this second concept, which is widely accepted in our federal common law. *See, e.g.*, *United States v. Gonyea*, 140 F.3d 649, 651 (6th Cir. 1998); *United States v. Fazzini*, 871 F.2d 635, 641 (7th Cir. 1989); *United States v. Twine*, 853 F.2d 676, 678 (9th Cir. 1988); *Pohlot*, 827 F.2d at 896. As one leading commentator further elaborates:

> [T]he *mens rea* variant of diminished capacity is not a separate defense that deserves to be called "diminished capacity" or any other name connoting that it is some sort of special, affirmative defense. The defendant is simply introducing evidence, in this case evidence of mental abnormality, to make the following claim: "I did not commit the crime charged because I did not possess the requisite *mens rea*." This is not an affirmative defense whereby the defendant admits or has proved against him the elements of the crime charged, but then raises a claim of justification or

> excuse. Further, a defendant claiming no *mens rea* because of mental disorder is not asserting some lesser form of legal insanity, that is, he is not claiming that he is partially or less responsible for the crime charged. Rather, the defendant is straightforwardly denying the prosecution's *prima facie* case by attempting to cast doubt on the prosecution's claim that a requisite mental element was present at the time of the offense.

Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 6 (1984).

B. Dr. Sell's Right To Present Evidence Of Diminished Capacity Rests In The Fifth And Sixth Amendments.

In reversing the Eighth Circuit, this Court should recognize the constitutional underpinnings of Dr. Sell's right to present evidence of his diminished capacity. Indeed, this right is a logical extension of several long-recognized rights under our Constitution. First, the Sixth Amendment protects Dr. Sell's right to present his own defense. *Faretta v. California*, 422 U.S. 806, 819 (1975). Second, both the Fifth and Sixth Amendments provide his right to testify on his own behalf, *i.e.*, Dr. Sell's fundamental right "to present his *own* version of events in his *own* words." *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987) (emphasis added). Third, this Court has recognized that the right to testify is of greatest constitutional significance where, as here, the accused potentially seeks to testify regarding his lack of the requisite *mens rea* necessary for conviction. *Crawford v. United States*, 212 U.S. 183, 202-203 (1909); *United States v. Hayes*, 477 F.2d 868, 873 (10th Cir. 1973) ("Where a defendant's intent is in issue he

should be permitted to testify as to his motive and actual intent or state of mind."); *United States v. Edwards*, 458 F.2d 875, 884 (5th Cir. 1972) ("[W]e think justice would require that the defendant be given an opportunity to take the stand and state to the jury that he intended no wrongdoing."); *Krogmann v. United States*, 225 F.2d 220, 229 (6th Cir. 1955) ("[T]he rule is well settled that in a criminal proceeding where the intent of the defendant is in issue the defendant may testify as to what his intent was."). Dr. Sell's presentation of a diminished capacity defense – that is, offering his own defense through his testimony regarding the most critical element of the government's case – flows directly from this bundle of rights.

II. The Eighth Circuit's Opinion Violates Dr. Sell's Right To Present Evidence Of His Diminished Capacity.

This Court should reverse the Eighth Circuit's opinion for failing to even address, let alone appropriately analyze, the significance of the Fifth and Sixth Amendment rights discussed above. The Eighth Circuit's opinion stands in contradiction with *Rock v. Arkansas*' constitutional mandate of allowing Dr. Sell to present "his *own* version [of his state of mind] in his *own* words." Without reiterating the numerous and significant effects of psychotropic medication, *Riggins v. Nevada*, 504 U.S. 127, 134, 141-144 (1992) (Kennedy, concurring), the government's forced administering of these drugs would affect, *inter alia*, Dr. Sell's abilities to "understand and respond to questions while testifying" and to describe the nature and extent of his delusional disorder. Dora W. Klein, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary*

Medications to a Defendant During Trial, 55 Vand. L. Rev. 165, 199 (2002). Indeed, psychotropic medication may affect his ability to actually decide to testify in the first instance. *Id.* at 191.

Under the Eighth Circuit's opinion, the government will compel the administering of psychotropic drugs to Dr. Sell and bring him to trial, where he would perhaps take the stand to testify. Yet, in contravention of this Court's precedents, his words would not be his own. They would be the government's.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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